

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN

&

THE HONOURABLE MR. JUSTICE K.P.BALACHANDRAN

TUESDAY, THE 28TH NOVEMBER 2006 / 7TH AGRAHAYANA 1928

WA.No. 2080 of 2006()

AGAINST THE JUDGEMENTIN WPC.26126/2006 Dated 05/10/2006

.....

APPELLANT: PETITIONER:

MANN JANARDDANAM NAIR,
'SREE REMYAM', K.P.XII/454(A), MULLASSERI JN.,
KARAKULAM P.O., THIRUVANANTHAPURAM.

BY ADV. SRI.R.GOPAN

RESPONDENTS: RESPONDENTS:

1. STATE OF KERALA,
REPRESENTED BY THE SECRETARY, HOME DEPARTMENT,
SECRETARIAT, THIRUVANANTHAPURAM.
2. THE DIRECTOR GENERAL OF PROSECUTION,
DIRECTORATE OF PROSECUTION, ERNAKULAM.
3. THE INSTITUTE OF MANAGEMENT IN
GOVERNMENT, THIRUVANANTHAPURAM,
REPRESENTED BY ITS SECRETARY.

BY GOVT.PLEADER SRI BENNY GREVACIS

THIS WRIT APPEAL HAVING COME UP FOR ADMISSION
ON 17/11/2006, ALONG WITH WA NO. 2081 OF 2006, THE
COURT ON 28/11/2006 DELIVERED THE FOLLOWING:

P.R.RAMAN & K.P.BALACHANDRAN, JJ.

W.A.NO.2080 & 2081 OF 2006

Dated this the day of November, 2006

JUDGMENT

Raman, J.

W.A.No.2080 arises out of the judgment in W.P.(C).No.26126/2002 and W.A.No.2081/2006 arises out of the judgment in W.P.(C).No.20035/2006. Appellants are the petitioners in the respective writ petitions. The challenge made was against the selection for the post of Assistant Public Prosecutor Grade-II. Going by the judgments of this Court W.P.(C).No.20035/2006 was disposed of first and W.P.(C).No.26126/2006 was disposed of wherein reference was also made to the judgment in W.P.(C).No.20035/2006. As the subject matter of the challenge is same, we dispose of these writ appeals by this common judgment.

W.A.NO.2080 & 2081/2006

2. The prayer made in W.P.(C). No.20035/2006 is to quash Ext.P7 rank list published for the post of Assistant Public Prosecutor Grade II and for a direction to furnish the information as requested in Exts.P2 and P3. According to the appellant, he appeared for the written test conducted by the 3rd respondent Institute of Management in Government, Thiruvananthapuram, which was entrusted to conduct the written test. Subsequently, he was also called for interview held on 27/11/2005 and according to him, he came out successful in the interview. Later, Ext.P4 rank list was published by the 1st respondent and the petitioner wanted to know the split-up marks scored by him for the written test and the interview. Though he invoked the provisions of the Right to

W.A.NO.2080 & 2081/2006

Information Act, there was no positive response from the authorities and feeling suspicious about the conduct of the selection, he approached this Court invoking the writ jurisdiction of this Court under Article 226 of the Constitution of India seeking for the relief as stated above. The challenge against Ext.P7 was mainly on the ground that the marks allotted for the interview is arbitrary and there is also possibility of excess marks having been awarded to the top ranking candidates for the interview. The learned Single Judge, before whom the matter came up for consideration, directed to ascertain and inform this Court the maximum percentage of marks fixed for the interview and the marks scored by the candidate, who got the highest mark for viva-voce. It is the submission of

W.A.NO.2080 & 2081/2006

the learned Government Pleader that out of 750 marks allocated for the written test and interview together, 600 marks were allocated for the written test and 150 marks for the interview, so however, the highest mark actually awarded at the time of interview is only 81.25. Thus, no candidate was awarded more than 81.25 marks. The learned Single Judge, in such circumstances, found that though 150 marks were fixed for viva voce test, since nobody has been awarded the marks higher than 81.25 for viva voce, the allocation of 150 marks had lost its relevance and that was only in theory and the marks actually awarded did not exceed 12.2 percentage.

3. Even applying the dictum laid down in **Ashok Kumar Yadav v. State of Haryana ((1985)**

W.A.NO.2080 & 2081/2006

4 SCC 417) the selection for the post of Assistant Public Prosecutor Grade-II in such circumstances, has not been vitiated, as the percentage of marks awarded in the viva voce was less than 15%. Though the learned Government pleader appearing on behalf of the State raised an objection that none of the selected candidates was made as a party to the writ petition and that the writ petition was bad for non joinder of necessary parties, in view of the finding by the learned Single Judge that the selection is not arbitrary, thought not necessary to go into the issue regarding non joinder of necessary parties and the writ petition was dismissed.

4. The appellant in W.A.No.2080/2006 was also an applicant for the post of Assistant Public Prosecutor. He also appeared for the

W.A.NO.2080 & 2081/2006

written test and also for the interview subsequently held. According to him, he answered all the questions in the written examination correctly and performed well in the interview. Out of the 229 candidates were called for interview 60 candidates each were interviewed on 4 days. Petitioner was assigned Rank No.122 which according to him, is lower than the one he is entitled to. Writ Petition No.26126/2006 was filed for a writ of mandamus directing the 1st respondent to publish a fresh rank list of Assistant Public Prosecutor Grade-II on the basis of the marks obtained by the candidates in the written test after excluding the marks obtained in viva voce test. Petitioner also sought for a direction to conduct viva voce/interview afresh by a new committee consisting of a sitting Judge as the

W.A.NO.2080 & 2081/2006

Chairman with other members of integrity and honesty. The contention in substance was that the maximum marks allotted for interview exceeds the limit prescribed by the Apex Court in **Ashok Kumar Yadav's case**((1985) 4 SCC 417) besides raising the allegations against the manner in which the interview was conducted. The learned Single Judge held that the appellant challenged the rank list, Ext.P2 produced in the writ petition containing the names of 145 candidates in the main list and additional numbers of candidates included in the supplementary lists for the reserved communities and none of them was a party to the writ petition. The list also came into operation with effect from 22/6/2006 and the candidates, who were already included in the list, were sent for training. Thus, when the

W.A.NO.2080 & 2081/2006

candidates, who were likely to be affected, are not made parties to the writ petition, the learned Single Judge held that no writ could be issued quashing Ext.P2 as the writ petition itself is bad for non joinder of necessary parties. It was also held that the petitioner, though raised allegations against the manner in which the interview was conducted, did not demur until the list was published and the rank holders were sent up for training. The petitioner participated in the interview and after finding that he is not placed in the list in a comfortable position, subsequently filed this writ petition which lacks of bona fides. The challenge made against Ext.P2 was only after the proceedings reached an irreversible stage. The contention based on the Apex Court decision having been considered

W.A.NO.2080 & 2081/2006

in the earlier writ petition to which reference is already made above and following the view taken therein and on the totality of the circumstances, this writ petition was also dismissed.

5. Heard the parties.

6. According to the appellants, the selection for the post of Assistant Public Prosecutor Grade-II is vitiated on the following grounds; (1) that the allocation of marks in the interview is excessive and (2) that number of candidates, who were called for interview, were also exceeded twice or at least three times of the vacancies filled up, and according to him, both the above points are supported by the decision of the Apex Court in **Ashok Kumar Yadav's case ((1985) 4 SCC 417)** referred supra and a Division Bench

W.A.NO.2080 & 2081/2006

decision of this Court in **Sreekumar v. Travancore Devaswom Board (1993 (1) KLT 740)**.

7. The learned Government pleader appearing on behalf of the State on the other hand supported the judgment of the learned Single Judge and contended that the writ petition is liable to be dismissed, as the parties likely to be affected in case rank list is quashed by this Court, are not made parties. As such it is bad for non joinder of necessary parties. No relief could have been granted to the petitioners, since the parameters fixed by the Apex Court in **Ashok Kumar Yadav's case ((1985) 4 SCC 417)** was not violated in this case, since the maximum marks awarded in the interview was only 12.5% which is well below 15%. Further, the petitioners having appeared for the written test and

W.A.NO.2080 & 2081/2006

thereafter for the interview without demur are estopped from challenging the selection later merely because they were not in comfortable position in the list. This is nothing, but an after thought and this Court in such circumstances, could not exercise the discretionary power under Article 226 of the Constitution granting any relief to the petitioners and the learned Single Judge was right in dismissing those writ petitions.

8. In **Ashok Kumar Yadav's case** ((1985) 4 SCC 417) cited supra, the challenge was against the selection made by the Public Service Commission. In that case the Haryana Public Service Commission called for interview all the candidates numbering over 1300 who satisfied the minimum eligibility requirement by securing a minimum of 45% marks

W.A.NO.2080 & 2081/2006

in the written examination. The total number of candidates called for the interview represented more than 20 times the number of available vacancies. Regulation governing the selection procedure did not justify this action. It merely prescribes a minimum qualification for eligibility to appear at the viva voce test without any obligation on the HPSC to call for the viva voce test all candidates who satisfy the minimum eligibility requirement. But in doing so, the Apex Court held, the HPSC could not be said to be actuated by mala fide or oblique motive, as it was common ground between the parties that this was the practice which was being consistently followed by the HPSC over the years and what was done in that case was nothing exceptional. In paragraphs 20 and 21

W.A.NO.2080 & 2081/2006

the Apex Court held thus:

"We do not think we can agree with this conclusion reached by the Division Bench. But whilst disagreeing with the conclusion, we must admit that the Haryana Public Service Commission was not right in calling for interview all the 1300 and odd candidates who secured 45 % or more marks in the written examination. The respondents sought to justify the action of the Haryana Public Service Commission by relying on Regulation 3 of the Regulations contained in Appendix 1 of the Punjab Civil Service (Executive Branch) Rules, 1930 which were applicable in the State of Haryana and contended that on a true interpretation of that Regulation, the Haryana Public Service Commission was bound to call for interview all the candidates who secured a minimum of 45% marks in the aggregate at the written examination. We do not think this contention is well founded. A plain reading of Regulation 3 will show that it is wholly unjustified. We have already referred to Regulation 3 in an earlier part of the judgment and we need not reproduce it again. It is clear on a plain natural construction of Regulation 3 that what it prescribes is merely a

W.A.NO.2080 & 2081/2006

minimum qualification for eligibility to appear at the viva voce test. Every candidate to be eligible for appearing at the viva voce test must obtain at least 45% marks in the aggregate in the written examination. But obtaining of minimum 45% does not by itself entitle a candidate to insist that he should be called for the viva voce test. There is no obligation on the Haryana Public Service Commission to call for the viva voce test all candidates who satisfy the minimum eligibility requirement. It is open to the Haryana Public Service Commission to say that out of the candidates who satisfy the eligibility criterion of minimum 45% marks in the written examination, only a limited number of candidates at the top of the list shall be called for interview. And this has necessarily to be done because otherwise the viva voce test would be reduced to a farce. It is indeed difficult to see how a viva voce test for properly and satisfactorily measuring the personality of a candidate can be carried out, if over 1300 candidates are to be interviewed for recruitment to a service. If a viva voce test is to be carried out in a thorough and scientific manner, as it must be in order to arrive at a fair and

W.A.NO.2080 & 2081/2006

satisfactory evaluation of the personality of a candidate, the interview must take anything between 10 to 30 minutes. In fact, Herman Finer in his book on Theory and Practice of Modern Government points out that "the interview should last at least half an hour". The Union Public Service Commission making selections for the Indian Administrative Service also interviews a candidate for almost half an hour. Only 11 to 12 candidates are called for interview in a day of 5 1/2 hours. It is obvious that in the circumstances, it would be impossible to carry out a satisfactory viva voce test if such a large unmanageable number of over 1300 candidates are to be interviewed. The interviews would then tend to be casual, superficial and sloppy and the assessment made at such interviews would not correctly reflect the true measure of the personality of the candidate. Moreover, such a course would widen the area of arbitrariness, for even a candidate who is very much lower down in the list on the basis of marks obtained in the written examination, can, to borrow an expression used by the Division Bench, 'gatecrash' into the range of selection, if he is awarded unduly high marks at the viva voce

W.A.NO.2080 & 2081/2006

examination. It has therefore always been the practice of the Union Public Service Commission to call for interview, candidates representing not more than twice or thrice the number of available vacancies. Kothari Committee's report on the "Recruitment Policy and Selection Methods for the Civil Services Examination" also points out, after an in-depth examination of the question as to what should be the number of candidates to be called for interview:

The number of candidates to be called for interview, in order of the total marks in written papers, should not exceed, we think, twice the number of vacancies to be filled...

Otherwise the written examination which is definitely more objective in its assessment than the viva voce test will lose all meaning and credibility and the viva voce test which is to some extent subjective and discretionary in its evaluation will become the decisive factor in the process of selection. We are therefore of the view that where there is a composite test consisting of a written examination followed by a viva voce test, the number of candidates to be called for

W.A.NO.2080 & 2081/2006

interview in order of the marks obtained in the written examination, should not exceed twice or at the highest, thrice the number of vacancies to be filled. The Haryana Public Service Commission in the present case called for interview all candidates numbering over 1300 who satisfied the minimum eligibility requirement by securing a minimum of 45% marks in the written examination and this was certainly not right, but we may point out that in doing so, the Haryana Public Service Commission could not be said to be actuated by any mala fide or oblique motive, because it was common ground between the parties that this was the practice which was being consistently followed by the Haryana Public Service Commission over the years and what was done in this case was nothing exceptional. The only question is whether this had any invalidating effect on the selections made by the Haryana Public Service Commission.

We do not think that the selection made by the Haryana Public Service Commission could be said to be vitiated merely on the ground that as many as 1300 and more candidates representing more than 20 times the number of available

W.A.NO.2080 & 2081/2006

vacancies were called for interview, though on the view taken by us that was not the right course to follow and not more than twice or at the highest thrice, the number of candidates should have been called for interview. Something more than merely calling an unduly large number of candidates for interview must be shown in order to invalidate the selections made. That is why the Division Bench relied on the comparative figures of marks obtained in the written examination and at the viva voce test by the petitioners, the first 16 candidates who topped the list in the written examination and the first 16 candidates who topped the list on the basis of the combined marks obtained in the written examination and the viva voce test, and observed that these figures showed that there was reasonable likelihood of arbitrariness and bias having operated in the marking at the viva voce test. Now it is true that some of the petitioners did quite well in the written examination but fared badly in the viva voce test and in fact their performance at the viva voce test appeared to have deteriorated in comparison to their performance in the year 1977-78. Equally it is true that out of the first 16 candidates who topped the

W.A.NO.2080 & 2081/2006

list in the written examination, 10 secured poor rating in the viva voce test and were knocked out of the reckoning while 2 also got low marks in the viva voce test but just managed to scrape through to come within the range of selection. It is also true that out of the first 16 candidates who topped the list on the basis of the combined marks obtained in the written examination and the viva voce test, 12 could come in the list only on account of high marks obtained by them at the viva voce test, though the marks obtained by them in the written examination were not of sufficiently high order. These figures relied upon by the Division Bench may create a suspicion in one's mind that some element of arbitrariness might have entered the assessment in the viva voce examination. But suspicion cannot take the place of proof and we cannot strike down the selections made on the ground that the evaluation of the merits of the candidates in the viva voce examination might be arbitrary. It is necessary to point out that the Court cannot sit in judgment over the marks awarded by interviewing bodies unless it is *proved* or *obvious* that the marking is plainly and indubitably arbitrary or affected by oblique motives. It is

W.A.NO.2080 & 2081/2006

only if the assessment is patently arbitrary or the risk of arbitrariness is so high that a reasonable person would regard arbitrariness as inevitable, that the assessment of marks at the viva voce test may be regarded as suffering from the vice of arbitrariness. Moreover, apart from only three candidates, namely, Trilok Nath Sharma, Shakuntala Rani and Balbir Singh one of whom belonged to the general category and was related to Shri Raghubar Dayal Gaur and the other two were candidates for the seats reserved for Scheduled Castes and were related to Shri R.C. Marya, there was no other candidate in whom the Chairman or any member of the Haryana Public Service Commission was interested, so that there could be any motive for manipulation of the marks at the viva voce examination. There were of course general allegations of casteism made against the Chairman and the members of the Haryana Public Service Commission, but these allegations were not substantiated by producing any reliable material before the Court. The Chairman and members of the Haryana Public Service Commission in fact belonged to different castes and it was not as if any particular caste was

W.A.NO.2080 & 2081/2006

predominant amongst the Chairman and members of the Haryana Public Service Commission so as even to remotely justify an inference that the marks might have been manipulated to favour the candidates of that caste. We do not think that the Division Bench was right in striking down the selections made by the Haryana Public Service Commission on the ground that they were vitiated by arbitrariness or by reasonable likelihood of bias."

It was held that reasonable likelihood of bias vitiating the 'whole gamut of the selection process' could not be established in that case on the basis of number of candidates called for viva voce test.

9. The allocation of high percentage of marks as 33.3% in the case of ex-service officers and 22.2% in case of other candidates for the viva voce test for selection to Haryana Civil (Executive Branch) and Allied Services was held to be unreasonable and

W.A.NO.2080 & 2081/2006

renders the selection process arbitrary. It was found on facts that the spread of marks in the viva voce test was enormously large compared to the spread of marks in the written examination, the viva voce test tended to become a determining factor in the selection process. It was suggested that since the marks allocated for the viva voce test by the Union Public Service Commission in case of selection to the Indian Administrative Services and other Allied Services is 12.2% and that has been found to be fair and just, as striking a proper balance between the written examination and the viva voce test, it was directed that hereafter in case of selections to be made to the Haryana Civil Services (Executive Branch) and other Allied Services, where the competitive examination consists of a written

W.A.NO.2080 & 2081/2006

examination followed by a viva voce test, the marks allocated for the viva voce test shall not exceed 12.2% of the total marks taken into account for the purpose of selection. It was suggested that same percentage should be adopted by the PSC in other States also. However, the percentage of marks allocated for the vive voce test in case of ex-service officers, may be somewhat higher because the personalities of these ex-service officers being fully mature and developed, it would not be difficult to arrive at a fair assessment of their merits on the basis of searching and incisive viva voce test. It was therefore, directed that in their case the percentage of marks allocated for the viva voce test may be 25%. Whatever selections are made by the Haryana Public Service Commission in the

W.A.NO.2080 & 2081/2006

future shall be on the above basis. However, if the selections made in accordance with the prescription contained in these rules were now to be set aside, it will upset a large number of appointments already made on the basis of such selections and the integrity and efficiency of the entire administrative machinery would be seriously jeopardised. Therefore, the selection already made by the Haryana Public Service Commission was not set aside, though they have been made on the basis of an unduly high percentage of marks allocated for the viva voce test.

10. It was this decision that was followed in the Division Bench decision in **Sreekumar's case (1993 (1) KLT 740)** for upsetting the selection, where the percentage of marks for the interview was found to be excessive. From

W.A.NO.2080 & 2081/2006

the decision of the Apex Court it is clear that the allocation of higher percentage of marks in the interview, if becomes decisive in the matter of selection, it would vitiate the selection process. However, the fixation of the percentage of marks at 15% was not rigid in all situations as the Apex Court itself held that the percentage of marks allocated in the case of ex-service officers would be higher and the percentage could be 25%.

11. Applying the dictum laid down by the Apex Court in **Ashok Kumar Yadav's case** ((1985) 4 SCC 417) if we examine the facts in the present case, it is beyond doubt that the selection process for the post of Assistant Public Prosecutor Grade-II is not vitiated. It was found by the learned Single Judge that the maximum marks awarded in the viva voce test

W.A.NO.2080 & 2081/2006

was only 12.5%. If a process of selection is challenged prior thereto on the ground that the marks awarded in the viva voce test is excessive, the possible relief that could be granted is to direct the authorities to reduce the percentage and fixed it at 15% as may be justified on the factual situation, but when a selection is already held, then the court has necessarily to see whether the selection is vitiated because any candidate has been awarded marks in excess, since the vitiating factor will be the awarding of marks in excess of the prescribed percentage as approved by the Apex Court. In this case, petitioners sought to challenge the selection, after publication of the rank list and after they have participated in the entire process of selection. When it is found that the awarding

W.A.NO.2080 & 2081/2006

of the marks in the viva voce was only 12.5%, it only means that the authorities, even in the absence of any direction, have reduced the percentage by awarding maximum marks of 12.5%. Thus, the process of selection is not shown to be vitiated, since the awarding of marks in the present case is less than 15%. Hence, the rank list cannot be quashed as sought for.

12. Even though it is contended that more than twice the number of candidates were called for interview, the petitioner himself admits the fact that the interview was held for four days and only 60 candidates were interviewed per day. At any rate, that does not prejudicially affect the rights of the petitioners, since it has not been shown that even if a lesser number of candidates were called for interview, the petitioners' marks

W.A.NO.2080 & 2081/2006

in the written test were so high to fall within lesser number of candidates, who would have been called for the interview. On the other hand, the very rank of the petitioners would clearly show that there were other candidates much above the petitioners and hence this factor has not vitiated the selection.

13. Finally, it is mandatory that pursuant to the selection process, candidates selected have been sent for training and so upsetting the whole process of selection and quashing the rank list would directly affect the right of such candidates selected and when they being not made as parties to the writ petition, writ petition is liable to be dismissed on the ground of non joinder of parties itself.

W.A.NO.2080 & 2081/2006

14. The learned Single Judge has dealt with the matter on all the points and found that the selection is not vitiated. For the above reasons, we fully agree with the view expressed by the learned Single Judge.

In the result, there is no merit in these appeals and they are accordingly dismissed.

P . R . RAMAN ,
Judge .

K . P . BALACHANDRAN ,
Judge .

kcv.